IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 432

ROBERT H. KENNEY,

*Petitioner,*

v.

WABASH RAILROAD COMPANY,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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*To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on April 22, 1952. Petition for rehearing was denied by the United States Court of Appeals for the Fifth Circuit on June 4, 1952. The Supreme Court, by order

dated September 2, 1952, granted the petitioner until November 1, 1952, within which to file a petition for writ of certiorari.

## OPINIONS BELOW.

The findings of fact and conclusions of law of the District Court (R. 19 ) are unreported. The opinion of the Court of Appeals (R. 27 ) is not yet reported.

## JURISDICTION.

The jurisdiction of the Supreme Court to review the decision of this case rests upon *28 U.S.C. 1254(1)*.

## QUESTIONS PRESENTED.

1. Has the petitioner complied with the requirements of the re-employment provisions of the Merchant Marine Re-employment Act as amended?

2. Since the statute upon which the petitioner relies contains no specific provision requiring a seaman covered by the statute to file an application for a certificate of continuous service, does the statute require that this duty be placed upon the Maritime Commission or upon a seaman who may not even had occasion to learn of the benefits which Congress saw fit to provide for him under the statute?

3. Is there a requirement in the Merchant Marine Re-employment Act or the amendments thereto requiring that a certificate of continuous service be issued within forty or ninety days after the termination of the maritime service of the applicant for reinstatement?

4. Is it the duty of a seaman to procure a certificate of continuous service at a time when he is aboard a merchant vessel of the United States in foreign waters?

5. Is the conclusion that the amendment to the Merchant Marine Re-employment Act does not confer re-employment privileges upon the petitioner opposed to the clear language of the statute, the express intent of Congress and the established rules of statutory construction?

## STATUTES INVOLVED.

The pertinent statutory provisions are printed in Appendix A to this petition, pages 8 through 15.

## STATEMENT OF THE CASE.

The petitioner, a licensed merchant mariner, was employed by the defendant, Wabash Railroad Company, in the capacity of Chief Clerk from 1929 until November 30, 1943, at which time he obtained a written release for the purpose of serving with the Army Transport Service. Petitioner served in the Army Transport Service thereafter until his release on February 12, 1945. In a letter dated March 17, 1945, the petitioner requested of the Wabash Railroad Company restoration to the position held prior to his service in the Army Transport Service. Petitioner was advised by the Company on March 27, 1945, that he was denied re-employment solely for the reason that they did not consider service in the Army Transport Service as service in the armed forces. Petitioner pursued his request for re-employment with the Wabash Railroad Company through channels up to the Vice President. All efforts of the petitioner to seek re-employment were to no avail.

The petitioner was at this time over thirty-five years of age. It was impossible for him to secure employ-

ment in his chosen profession. The petitioner was thus forced on January 4, 1946, to return to the sea in order to meet current obligations. After hospitalization following this term of shipment, on September 18, 1947, the petitioner learned of the Merchant Marine Re-employment Act. He placed his case in the hands of the Department of Labor, Bureau of Veterans' Re-employment Rights, in February, 1948.

The Department of Labor, Bureau of Veterans' Re-employment Rights, pointed out to the Wabash Railroad Company, on March 26, 1948, that according to *Public Law 87*, 78th Congress, as amended, members of the Merchant Marine who entered service between May 1, 1940, and July 25, 1947, have re-employment rights. When reinstatement was refused, in November, 1948, the matter was placed in the hands of the United States District Attorney.

The petitioner's case was tried by the United States District Court without a jury and completely on stipulated facts. The stipulation was entered into by the Assistant United States Attorney, who then represented the petitioner, and attorneys for the Wabash Railroad Company. This stipulation was entered into without the knowledge or consent of petitioner. Facts were stipulated with no regard to pertinent statutes. The District Court concluded that the petitioner had not complied with the requirements of the *Merchant Marine Re-employment Act* in that he had delayed in procuring a certificate of continuous service and making further application to the Wabash Railroad Company, which barred his right to re-

employment. The Court thus concluded the action should be dismissed.

The United States Court of Appeals for the Fifth Circuit affirms the opinion of the District Court. It held that petitioner's unexplained delay in procuring a certificate of continuous service after the petitioner became eligible, and consequent delay in making further application barred his action.

## SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that the petitioner's employment was terminated solely for the purpose of accepting civilian employment in the Army Transport Service in conflict with the provisions of *Public Law 263*, 79th Congress, which *Act* places responsibility for issuing licenses and registering officers of the United States Merchant Marine with the Bureau of Marine Inspection, United States Coast Guard.

2. In holding that the petitioner did not leave his position to perform service in the Merchant Marine as that term was then defined in the *Act*, in conflict with the *Merchant Marine Law, Public Law 835*, 74th Congress, which provides for registration and documentation of vessels in the United States.

3. In holding that a certificate of substantially continuous service must be furnished by the petitioner, contrary to the regulations of the United States Maritime Commission.

4. In holding that the petitioner was not entitled to a certificate of substantially continuous service and had

no rights under the *Merchant Marine Re-employment Act*, as amended.

5. In holding that a delay of almost two years by the petitioner in procuring a certificate of continuous service and making further application bars the petitioner right to re-employment.

6. In holding that there was an unexplained delay of over twenty-two months in the petitioner's obtaining a certificate of continuous service.

7. In disregarding the regulations of the United States Maritime Commission which do not require that any action be taken by a mariner in order to obtain a certificate of continuous service.

8. In affirming the judgment of the District Court.

**REASONS FOR GRANTING THE WRIT.**

1. The decision of the Court below is in conflict with the decision of this Court which holds that every vessel of the United States must have a register or an enrollment, the former for foreign trade, the latter for domestic commerce. Without them, and without the right one, a vessel is entitled to no protection under United States laws. A register may be exchanged for an enrollment. *Badger v. Gutierrez*, 111 U. S. 74 (1884).

2. The decision of the Court below is in conflict with the decision of this Court which holds that everyone is entitled to the privileges of a "Seaman" who, like seamen, at all times contribute to the labor about the operation and welfare of the ship when she is upon a voyage. *Norton v. Warner Co.*, 321 U. S. 565, 566 (1944).

3. The decision of the Court below is in conflict with the decision of this Court which holds that Seamen are wards of the admiralty whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly, because of the special circumstances attending their calling. *Socony-Vacuum Oil Co. v. Smith*, 305 U. S. 424 (1939).

4. The decision of the Court below is in conflict with the decision of this Court which holds that seamen become obligated to merchant vessels from the time they sign the Shipping Articles, and from that time they may incur the penalties of desertion. *Tucker v. Alexandroff*, 183 U. S. 424 (1902).

5. The questions presented are matters of great public importance because a decision which violates numerous statutes under *Volume 46, U. S. Code-Shipping*, would create chaos of such magnitude as to nullify the *Merchant Marine Acts* and supporting statutes.

## CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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November 1, 1952

## APPENDIX A.
## STATUTES AND REGULATIONS INVOLVED.
### U. S. Code, Title 46—*"Shipping"*

1. Public Law 87, 78th Congress, Chapter 142, 1st. Session, June 23, 1943, (C. 142, 57 Stat. 162, U.S.C.A. Title 50, App. Secs. 1471-1475) Merchant Marine Reemployment Act.

2. Public Law 660, August 8, 1946, C. 867, 60 Stat. 905—Amendment.

3. Public Law 263, 79th Congress, 60 Stat. 1097, Section 6, Placing responsibility for issuing licenses and registering Officers of the United States Merchant Marine.

4. Public Law 492, 79th Congress, 60 Stat. 501, Transferring functions of the Administrator, W.S.A., to United States Maritime Commission.

5. Public Law 198, 65th Congress, 50 Stat. 900, Documentation under laws of United States defined.

6. Public Law 835, 74th Congress, 49 Stat. 1987-49 Stat. 2016, Merchant Marine Act, Registration—Documentation.

7. Public Law 420, 68th Congress, 43 Stat. 948, Port of Documentation Defined.

8. Public Law 251, 76th Congress, 53 Stat. 1147-53 Stat. 1146, Certificate of Registration of Staff Officers in the United States Merchant Marine.

9. Public Law 622, 74th Congress, 49 Stat. 2016-49 Stat. 1380, Classification of Vessels by American Bureau of Shipping; Publication List of Former Names.

10. Public Law 144, 66th Congress, 41 Stat. 436, Change in Name of Vessel.

11. Public Law 420, 62nd Congress, 37 Stat. 736, Surrender of Certificate of Registration.

12. Public Law 201, 73rd Congress, 48 Stat. 663, Pursers and Surgeons.

13. Public Law 808, 74th Congress, 49 Stat. 1934, 1936, Certificate of Discharge; issuance; form and contents; Bureau of Marine Inspection and Navigation—United States Coast Guard.

14. Public Law 705, 75th Congress, 52 Stat. 965, Maritime Employment Defined.

## STATUTES.

Public Law 144, Chapter 83, Section 2, 66th Congress, 41 Stat. 436. An ACT to authorize Commissioner of Navigation to change the names of vessels.

That the Commissioner of Navigation, with the approval of the Secretary of Commerce, shall establish such rules and regulations and procure such evidence as to age, condition, where built, and pecuniary liability of the vessels as he may deem necessary to prevent injury to public or private interests; and when permission is granted by the Commissioner of Navigation, he shall cause the order for the change in name to be published at least in four issues in some daily or weekly paper at the place of

documentation, and the cost of procuring evidence and advertising the change of name to be paid by the person or persons desiring such change of name.

Public Law 201, Chapter 212, 73rd Congress, 48 Stat. 663. An ACT authorizing pursers or licensed deck officers of vessels to perform the duties of the Master of such vessels in relation to entrance and clearance of same.

That whenever under any provision or provisions of any statute of the U. S. it is made the duty of the master of the vessel to make entry and clearance of same, it shall be lawful for such duties to be performed by any licensed deck officer or purser of such vessel; and when such duties are performed by a licensed deck officer or purser of such vessel, such acts shall have the same force and effect as if performed by the master of such vessel: Provided, That nothing herein contained shall relieve the master of any penalty, or liability provided by any statute relating to the entry or clearance of vessels.

Public Law 251, Chapter 409, Section 1, 76th Congress, 53 Statute 1146. An ACT To provide for the registration of Purser or Surgeon as Staff Officer on vessels of United States and for other purposes.

That there shall be registered staff officers in the United States Merchant Marine in the following grades: (1) Chief Purser; (2) Purser; (3) Sr. Assistant Purser; (4) Jr. Assistant Purser and (5) Surgeon. The Secretary of Commerce shall register, and issue certificate of registration to qualified individuals applying for registration in such grades as hereinafter provided, and every such

individual when so registered and serving in the staff department on a vessel of the United States shall rank as a staff officer on such vessel.

As used in this ACT the term "vessel of the United States" shall mean any vessel registered, enrolled or licensed under the laws of the United States, but shall not include a fishing or whaling vessel or yacht.

Public Law 622, 74th Congress, 41 Stat. 998, Section 25. An ACT—Merchant Marine Act 1936.

That for the classification of vessels owned by the United States, and for such other purposes in connection therewith as are the proper functions of a classification bureau, all departments, boards, bureaus and commissions of the Government are hereby directed to recognize the American Bureau of Shipping as their agency so long as the American Bureau of Shipping continues to be maintained as an organization which has no capital stock and pays no dividends.

Public Law 835, Section 503, 74th Congress, 49 Stat. 1987—Upon completion of the construction of any vessel in respect to which a construction subsidiary is to be allowed under this title and is delivered by the shipbuilder to the Commission, the vessel shall be documented under the laws of the United States, and concurrently therewith or as soon thereafter as practicable, the vessel shall be delivered with a bill of sale to the applicants, with warranty against liens, pursuant to the contract of purchase between the applicant and commission hereinafter provided for. The vessel shall remain documented under the laws of the United States for not less than twenty years,

and so long as there remains due the United States any principal or interest on account of the purchase price, whichever shall be the longer period. The purchaser shall also comply with all the provisions of Section 9 of the Merchant Marine Act 1920.

An ACT to further the development and maintenance of an adequate and well balanced American Merchant Marine, to promote the commerce of the United States, to aid in national defense, to repeal certain former legislation, and for other purposes. Merchant Marine Act 1936.

Public Law 198, Section 42, 65th Congress, 40 Stat. 903, Shipping Act 1916—Documented under laws of the United States.

That any vessel registered, enrolled or licensed under the laws of the United States shall be deemed to continue to be documented under the laws of the United States within the meaning of sub. (b) of section 37, until such registry, enrollment or license is surrendered with the approval of the board, the provisions of any other Act of Congress to the contrary notwithstanding. Section 1—The term "documented under the laws of the United States" means registered, enrolled or licensed under the laws of the United States.

Public Law 705, 75th Congress, 52 Stat. 965, An ACT, To amend the Merchant Marine Act 1936 to further promote the merchant marine policy, therein declared, and for other purposes.

Section 215—"Every vessel acquired under authority of this section that is not documented under the laws of the United States at the time of its requisition shall be so documented as soon as practicable.

Section 1003 (b) The term 'maritime employer' means any person not included in the term 'carrier' in Title I of the Railway Labor Act, approved May 20, 1926, as amended, who (1) is engaged in the transportation by water of passengers or property of waterborne commerce; (2) is engaged in towboat, barge or lighterage service in connection with the transportation of passengers or property in waterborne commerce; (3) operates or manages or controls the operation or management of any wharf, pier, dock, or water span, for the accommodation of vessels engaged in the transportation of passengers or property in waterborne commerce; (4) is engaged in the business of loading or unloading vessels engaged in the transportation of passengers or property in waterborne commerce; or (5) operates any facility connected with the services set forth in clauses (1), (2), (3) and (4) hereof, which is necessary for the continuity of flow of passengers or property in such waterborne commerce.

Public Law 420, 68th Congress, 43 Stat. 948—An ACT to establish home ports of vessels of the United States, to validate documents relating to such vessels, and for other purposes.

That for the purposes of the navigation laws of the United States and of the Ship Mortgage Act 1920, otherwise known as Sec. 30 of the Merchant Marine Act 1920,

every vessel of the United States shall have a "home port" in the United States, including Alaska, Hawaii, and Puerto Rico, which port the owner of such vessel, subject to the approval of the Commissioner of Navigation of the Department of Commerce, shall specifically fix and determine, and subject to such approval may from time to time change. Such home port shall be shown in the register, enrollment or license, or license of such vessel, which documents are hereinafter referred to as the vessels document. The home port shown in the document of any vessel of the United States in force at the time of approval of this Act shall be deemed to have been fixed and determined in accordance with the provisions hereof.

Public Law 263, 79th Congress, 60 Stat. 1097, Reorganization Act of 1945. An ACT to provide for the reorganization of Government Agencies, and for other purposes, Reorganizaiton Plan No. 3 of 1946, Part 1, Department of the Treasury:

Section 101—Functions transferred to the United States Coast Guard (a) There are hereby transferred to the Commandant of the United States Coast Guard those functions of the Bureau of Marine Inspection and Navigation, the Board of Supervising Inspectors, the Boards of Local Inspectors, the Marine Casualty Investigating Board, the Marine Boards, and the Secretary of Commerce, which pertain to classification of vessels; licensing and certificating of officers, pilots and seamen, suspension and revocation of licenses and certificates; enforcement of manning requirements, citizenship requirements, and requirements for the mustering and drilling of crews,

control of log books, shipment, discharge, protection, and welfare of merchant seamen, and

Section 102—Functions transferred to Bureau of Customs—There are hereby transferred to the Commissioner of Customs those functions which pertain to registry, enrollment, and licensing of vessels.

Public Law 808, 1 (b), 79th Congress, 49 Stat. 1934, 1936—Upon the discharge of any seaman and the payment of his wages, the Shipping Commissioner shall enter into the continuous discharge book of such seaman the name of the vessel, the nature of the voyage, (foreign or coastwise), the class to which the vessel belongs (steam, motor, sail, or barge), the date and place of the shipment, and of the discharge of such seaman, and the rating thus held by such seaman.